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Twenty-eighth session

SUMMARY RECORD OF THE 566th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 15 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

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The meeting was called to order at 2.10 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW *(continued)* (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

Article 1 *(continued)*

1. **Ms. REMSU** (Observer for Canada) said that she agreed with the representatives of Germany and the United States on the undesirability of upsetting the compromise that had been achieved in the Working Group on Electronic Data Interchange on the wording of article 1. The first sentence could be accommodated within Canada's statutory framework, and she was in favour of leaving the article as proposed by the Working Group (A/CN.9/406, annex). The proposal made by the representative of Australia was interesting but might prove contentious.

2. **Mr. CHAY** (Singapore) said that the intention of his Government's proposal (A/CN.9/409), that article 1 should be amended to: "This Law applies to commercial transactions where information in the form of a data message is used" was not to reopen the discussion on the scope of application of the Model Law but simply to offer a drafting alternative aimed at achieving consistency with other UNCITRAL texts and avoiding the term "commercial law", which was virtually meaningless in Singapore. He supported the idea of explaining the term "commercial" in a footnote.

3. **Mr. BURMAN** (United States of America) said that the Singaporean proposal might be a way of improving the wording of the article while retaining the basic ingredients of the compromise. The footnote should remain, with perhaps an addition to the effect that any State might expand the scope of the Model Law to cover other forms of data communication.

4. **Mr. BONELL** (Italy) said that he supported the Singaporean proposal with the qualification put forward by the representative of the United States of America.

5. **Mr. SCHNEIDER** (Germany) said that, in his view, the first sentence of article 1 was far from meaningless but the Singaporean proposal achieved the same aim of restricting the scope of the Model Law to commercial transactions. He therefore supported it, with the refinement suggested by the representative of the United States of America.

6. **Mr. ALLEN** (United Kingdom) said that he could not support the proposed Singaporean amendment. It was much more restrictive than the existing first sentence of article 1, which represented a careful compromise reached after lengthy discussion in the Working Group. He could envisage going along with the Singaporean proposal if it were incorporated as a footnote along the lines of the present footnote allowing individual States to restrict the scope of the Model Law if they chose.

7. **Mr. ABASCAL ZAMORA** (Mexico) said that he was inclined to support the Singaporean proposal with the qualification put forward by the representative of the United States of America. However, if other representatives felt that it might upset the existing compromise, he would agree to leave the wording as it stood.

8. **Ms. de LA PRESLE** (France) said that she agreed with the representative of the United Kingdom that it was important to maintain the option provided for in the Working Group's text. If some States were unhappy with the scope of the Model Law as specified in article 1, they could opt for the alternative set forth in the footnote concerning applicability. Incorporating the content of the footnote in the text of article 1 meant encouraging States to limit the applicability of the Model Law.

9. **Mr. GRANDINO RODAS** (Brazil) said that he supported the Singaporean proposal with the amendment suggested by the representative of the United States of America.

10. **Ms. REMSU** (Observer for Canada) said that she agreed with the representatives of the United Kingdom and France that the reference to commercial transactions should be confined to a footnote.

11. **Mr. GRIFFITH** (Australia) said that he would also opt for the footnote solution.

12. **Mr. BURMAN** (United States of America) said that, in expressing support for the Singaporean proposal, he had been referring to the text of the article, not to the inclusion of the Singaporean wording in a footnote. Such a move would, in his view, amount to a substantial change. Under those circumstances, he would prefer to keep the existing version of the article.

13. **The CHAIRMAN** said that, as he saw it, there were two options: limiting the Model Law to commercial transactions, in which case the Singaporean suggestion would be a possible solution; or broadening it to include other transactions, in which case the first sentence would be deleted and some redrafting would be necessary.

14. **Mr. GRIFFITH** (Australia) said that it was important to say something substantive in the article, rather than leaving it to the footnote. He felt that the Singaporean Government's suggestion was the best. It improved the wording of the article without affecting the consensus that had emerged from the Working Group. States that wished to widen the sphere of application of the Model Law to non-commercial areas would be entirely free to do so.

15. **Mr. ABASCAL ZAMORA** (Mexico) said that, as he saw it, the intention of the Working Group had been to restrict the sphere of application to commercial transactions. The compromise reached would be overturned if the text were to be broadened to include other transactions. An interminable debate would ensue on a vast array of new issues. Perhaps the wording of the first sentence could be improved but not at the cost of undermining the existing compromise.

16. **Mr. ALLEN** (United Kingdom) said that the Working Group had deliberately avoided the words "This Law applies to commercial transactions" because the Model Law dealt in large measure with rules of evidence that had no particular relation to transactions as such. Article 5, for example, applied to any communication between parties, whether or not it led to a transaction. All of that was quite irrespective of whether States wished to apply the same rules to dealings between commercial parties and administrative authorities. Even where there had been a commercial transaction using electronic data interchange, the resulting evidence might later be needed in the context of transmissions between a commercial party and administrative authorities, for example in connection with tax or customs law. Any reference to commercial transactions therefore represented a substantial departure from the compromise reached.

17. **Mr. BURMAN** (United States of America) suggested that the term "transactions" might be replaced by some other word such as "activities". He had not realized that the Singaporean suggestion might affect the compromise reached, and the Working Group's text could certainly be retained. He joined the representatives of Australia and Mexico in warning against the possibility of opening up the entire draft Model Law to debate by introducing a substantial amendment. If any redrafting were necessary, it should be left to the drafting group, on the understanding that due account would be taken of the concerns expressed by the representative of the United Kingdom.

18. **Mr. BONELL** (Italy) said that there seemed to be considerable support for a rewording of the article. Some delegations seemed to feel that the Working Group's text could be left because it was meaningless, but he feared, on the contrary, that it meant too much. A majority also seemed to be in favour of restricting the sphere of application of the draft Model Law to the commercial field. The Singaporean proposal seemed to be acceptable except for the objection to the word "transactions" raised by the representative of the United Kingdom. Perhaps the provision could state that the Law applied "in the context of commercial activities". He urged that the matter should be referred to the drafting group.

19. **Mr. UCHIDA** (Japan) expressed support for the Singaporean proposal.

20. **Ms. REMSU** (Observer for Canada) said that she wished to express strong support for the maintenance of article 1 as it stood. She was against any incorporation of terms such as "transactions" or "commercial activities" since they were unduly restrictive.

21. **Mr. SCHNEIDER** (Germany) said that the first sentence of article 1 as drafted by the Working Group had an important meaning for his delegation, namely that the Model Law would be restricted to the commercial sphere, but other delegations interpreted it differently. He believed that the version of the article proposed by Singapore would resolve the ambiguity and should be accepted.

22. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the first sentence as it stood would restrict the Model Law to commercial transactions. His delegation wished the Model Law to be broad enough to cover matters such as rules of evidence, communications and signatures in general, transmission of data messages, acknowledgements of receipt, formation of contracts, and place of dispatch and receipt of data messages. The law should apply to all transactions. He supported the views expressed on that subject by the United Kingdom.

23. **Mr. BONELL** (Italy) said that the Commission must address two separate issues: whether to restrict the scope of the Model Law to the commercial field and, having resolved that point, whether to restrict it to transactions *stricto sensu* or extend it to other matters. Both article 1 as it stood and the wording proposed by Singapore would restrict the Law to the commercial sphere, and of the two versions he preferred the latter.

24. **The CHAIRMAN** said he believed the Commission might accept the Singaporean proposal for article 1, supplemented by a footnote allowing States wishing to do so to extend the scope of the Model Law to non-commercial matters.

25. **Mr. ALLEN** (United Kingdom) said that his country would be unable to enact a provision which spoke of commercial law, although it could entertain the notion of a commercial transaction. He suggested treating the question of the scope of the law differently according to the chapter concerned. For example chapter II, which covered rules of evidence and did not apply only to transactions, might have a footnote stating that countries wishing to do so could restrict the provisions of the chapter to commercial transactions. Chapter III might then provide that the articles it contained applied to commercial matters only.

26. **Ms. BOSS** (United States of America) believed that the solution proposed by the United Kingdom would make for confusion. The Commission should opt either for article 1 as it stood or for the Singaporean wording, bearing in mind the decision of the Working Group to limit the application of the Model Law to messages transmitted in a commercial context.

27. **Mr. ABASCAL ZAMORA** (Mexico) said that the course suggested by the United Kingdom would represent a substantial departure from the consensus reached in the Working Group, in that chapter II of the Law would be of much broader application than the Group had intended.

28. **Mr. BONELL** (Italy) said that acceptance of the Singaporean proposal for article 1 and the addition of a footnote to the article allowing States to extend the scope of the law to non-commercial matters, as suggested by the Chairman, would meet what he believed was the wish of the majority of the Commission — to have a Model Law the text of which restricted its scope to the commercial sphere.

29. **The CHAIRMAN** asked whether the Commission wished to replace the text of article 1, as approved by the Working Group, by the wording proposed by Singapore in document A/CN.9/409, together with the footnote he himself had suggested earlier.

30. *It was so agreed.*

The meeting was suspended at 3.15 p.m. and resumed at 3.45 p.m.

Article 2

31. **The CHAIRMAN** said that article 2 was likely to prove controversial. The Commission might think it advisable to consider the remaining articles of the draft first.

32. *It was so agreed.*

Article 3

33. **Mr. SORIEUL** (Secretariat) said that article 3 was based on an analogous provision in the United Nations Convention on Contracts for the International Sale of Goods and had been the subject of limited discussion in the Working Group. He drew the Commission's attention to the comments made on the draft article by Singapore and the Banking Federation of the European Union, in document A/CN.9/409, and by France and the United Nations Environment Programme (UNEP), in documents A/CN.9/409/Add.3 and A/CN.9/409/Add.4 respectively.

34. **The CHAIRMAN** invited the Commission to consider article 3 (1).

35. **Mr. BONELL** (Italy) expressed the view that article 3 (1) should be retained as it stood. The addition to the text contained in the proposal of Singapore in document A/CN.9/409 was in line with the basic philosophy of the draft Model Law, but its inclusion in an article dealing with interpretation could create difficulties and might not necessarily further the purpose of facilitating the use of electronic means — for instance, if a less sophisticated trade partner were involved.

36. **Mr. SORIEUL** (Secretariat) said he wished to mention that the last words of the Singaporean proposal corresponded roughly to one of the preambular paragraphs of a text that the Secretariat had prepared for the draft resolution to be submitted to the General Assembly together with the text of the Model Law.

37. **Mr. CHOUKRI SBAI** (Observer for Morocco) suggested that the words "international source" be amended to read "international character".

38. **Ms. BOSS** (United States of America) said that the word "source" had been chosen because, once the Model Law was incorporated in domestic law, it would not itself be international in character. Secondly, it would be appropriate for the purpose of the Model Law to be stated in the Model Law itself because the provision would thus become part of domestic law, whereas the Commission's resolution would not. Tribunals would then be directed by article 3 to facilitate rather than obstruct EDI.

39. **The CHAIRMAN** suggested that, as there seemed to be no support for changing the word "source" to "character", the Commission might wish to retain "source".

40. *It was so agreed.*

41. **Mr. ABASCAL ZAMORA** (Mexico) supported the inclusion of the text proposed by Singapore. It was important to emphasize the purpose of the Model Law in the text itself, since there was a tendency in the legal profession to regard paper-based documents as safer than EDI.

42. **The CHAIRMAN**, after inviting delegations to indicate whether they were for or against the change proposed by Singapore, noted that there was insufficient support for the change. He therefore took it that the text would be retained as in the annex to document A/CN.9/406.

43. **Mr. ABASCAL ZAMORA** (Mexico) asked whether delegations that were against the change could state their reasons.

44. **The CHAIRMAN** said that the representative of Italy had indicated some reasons.

45. **Ms. BAZAROVA** (Russian Federation) said that she did not support the proposed amendment. It was not clear why the purpose of the Model Law should be mentioned in an article on interpretation. Furthermore, the purpose of the Model Law was not so much to develop and promote EDI as to assist countries already using EDI to regulate matters arising from its use.

46. **Mr. BURMAN** (United States of America), referring to paragraph (2), proposed the insertion at the end of the paragraph of a semicolon followed by the words: "there may also be taken into account rules formulated by international organizations for use in an electronic environment, and, where appropriate, usages of trade and system rules."

(Mr. Burman, United States of America)

47. The proposed provision was not mandatory but represented recognition of the work of international bodies that focused on electronic commerce and represented a step forward. The Organization of American States had adopted a convention in the previous year at Mexico City that included similar language.

48. **Mr. BONELL** (Italy) supported the United States proposal. Apart from "hard" law there was a growing development of "soft" law consisting of rules elaborated by different international or supranational bodies. It was desirable to recognize the increasing importance of such developments at least for the purpose of supplementing "strict" legal rules, for the benefit of both. He recalled that a similar provision had been adopted by the Commission the previous week and thought that a valuable precedent was being established for the future.

49. **Mr. SCHNEIDER** (Germany) said that the proposal of the United States was interesting but that he was not sure what rules and what international bodies were referred to. There were many very different types of international bodies, intergovernmental bodies such as UNCITRAL and private international bodies and associations. The term "rules" was open to various interpretations: there were private rules such as gentlemen's agreements, rules on how to draft contracts, etc. Furthermore, private international bodies often represented only special interests and it would not be clear to the reader of the proposed text who had set up the bodies in question and whose interests they really protected.

50. **Mr. PELICHET** (Observer for The Hague Conference on Private International Law) noted that the Commission was now discussing a draft model law, not a convention. If the legislator who took over the proposed Model Law found gaps he would fill them in according to national law on the basis of general principles that might take into account the work of international organizations, but there would be no need for a paragraph in the law referring to international organizations. The amendment proposed by the United States was out of place.

51. **Mr. ABASCAL ZAMORA** (Mexico) supported the inclusion of the amendment proposed by the delegation of the United States. Mexican legislation regulating the action of banks and documentary credit in particular had a similar provision that was related directly to the Uniform Customs and Practice for Documentary Credits (UCP). The proposed amendment could assist the task of creating a culture facilitating recourse to EDI and similar communication systems.

52. **Mr. MADRID** (Spain) said that he supported the text proposed by the United States delegation, but thought it should be made clear what international organizations were referred to, in the light of the point made by the representative of Germany. Furthermore, the drafting might be crisper.

53. **Mr. BROQVIST** (Observer for Sweden) supported the remarks of the representative of Germany and shared the doubts he had expressed.

54. **Ms. BOSS** (United States of America) said she would like to clarify her delegation's proposal, particularly in the light of the concerns expressed by the representatives of Germany, Spain and Sweden. The proposal did not require tribunals to give weight to the rules of an international organization, but rather provided that they might, if they wished, take them into account. In so doing, tribunals would obviously have regard to the nature of the rule-making body, and notably as to whether it was public or private in character.

(Ms. Boss, United States of America)

Other considerations were also important: some private international bodies had achieved such status that most jurisdictions would be likely to take their rules into account.

55. The United States proposal was not limited to international bodies, but also dealt with system rules, recognizing that there might at times be an appropriate role for what might be termed private rule-makers.

56. To sum up, the proposal was not mandatory but discretionary. The kind of concerns raised by the representative of Germany would be taken into account at the time the particular rules, or rule-making body, came to be considered.

57. **Ms. de LA PRESLE** (France) said that, if the "rules" laid down by international organizations, whether public or private, were of unequal value, the usages of commercial partners and of intermediaries of value-added networks, which imposed system rules, were even more so. The majority view in the past had been that intermediaries did not fall within the sphere of application of the Model Law, and that EDI partners had always had bilateral relations without intermediaries. Was it the intention to give legitimacy through article 3 of the Model Law to rules defined by intermediaries? Paragraph (2) of article 3 as now worded could take into account a wide range of provisions. The United States proposal would introduce a great deal of additional legal uncertainty.

58. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that, as the observer for the Hague Conference on Private International Law had pointed out, the Model Law would become part of the domestic law of countries that adopted it. Domestic law covered a number of subjects closely connected with the Model Law, such as contractual communications through intermediaries by telephone or by correspondence. A whole body of jurisprudence on the matter was already in existence. Paragraph (2) had been drafted in general terms, which could include not only domestic laws but also international law. He believed that the existing wording should be retained.

59. **Mr. UCHIDA** (Japan) said that in his view the objective of the United States proposal did not require adding any new wording to paragraph (2). He shared the concerns expressed by the representative of Germany, and preferred to retain the existing text.

60. **The CHAIRMAN** noted that the United States proposal was not supported. He took it that the Commission wished to retain the existing text.

Article 4

61. **Mr. SORIEUL** (Secretariat) said that article 4 contained what was regarded by some as the fundamental principle of the whole Model Law, and there had been fairly wide agreement on it in the Working Group. He drew attention to comments on the article in documents A/CN.9/409 and A/CN.9/409/Add.4.

62. **Mr. ALLEN** (United Kingdom) said that his delegation had a point to raise regarding drafting, which could perhaps be entrusted to the drafting group. In his view, information as such had no legal effectiveness, validity or enforceability: it was simply data. To say that information "shall not be denied legal effectiveness ...", was meaningless.

(Mr. Allen, United Kingdom)

63. Secondly, the article as drafted conflicted with the provisions of articles 5 and 7, which referred to existing rules of national law requiring information to be in writing or in an original document. As he saw it, article 4 would have the effect of invalidating requirements for information in writing or in a document, because it would effectively preclude any objection under national law relating to information being incorporated in a data message.

64. There was thus a need for another look at the text of the article, to ensure that it fulfilled its purpose without invalidating articles 5 and 7.

65. **Mr. MÄKELÄ** (Finland) supported Singapore's proposal (A/CN.9/409) to delete article 4. Alternatively, he could support the United Kingdom representative's approach.

66. **Mr. CHAY** (Singapore) said that his delegation had proposed deletion of article 4 principally because it felt that the existing wording merely stated the obvious. The very fact of introducing the Model Law would confer legal validity on data messages.

67. **Mr. BURMAN** (United States of America) said that article 4 had been considered by many during the long deliberations in the Working Group as a fundamental provision. While it might seem to some who worked in the field of electronic communications and their commercial application that the article merely stated the obvious, the world at large was not aware of the legal validity of data messages, as was clear from court proceedings that had taken place on the matter in a number of countries.

68. A basic text for article 4 had been agreed in the Working Group which he believed was of great importance, and could be seen as the *raison d'être* of the entire Model Law. In his view, articles 5 to 8 did not cover all possible issues that might arise, and it was essential to give a clear direction to courts and arbitrators in order to overcome their reluctance to implement EDI. Retention of article 4 was essential in order to enable the Model Law to carry the message it was intended to convey.

69. **Mr. ABASCAL ZAMORA** (Mexico) said article 4 was not a statement of the obvious, but rather a provision of a general character establishing the legal validity of messages delivered via a certain means of communication. He agreed that it embodied a fundamental principle of the Model Law, and should be retained.

70. **Ms. de LA PRESLE** (France) endorsed the views of the two previous speakers. Article 4 had, at the very least, an educational value, and as such should be retained. She agreed that the language of the article could be improved.

71. **Ms. BAZAROVA** (Russian Federation) favoured retention of article 4, and agreed with the explanations given by other speakers in that regard.

72. **Mr. CHOUKRI SBAI** (Observer for Morocco) agreed that article 4 was useful in that it embodied a general rule. However, he did not think the wording was appropriate. He would prefer a formulation along the lines: "The exchange of information in the form of a data message shall have legal validity ...".

73. **Mr. GRIFFITH** (Australia) said his delegation had no difficulty with article 4, since the word "solely" made quite clear how the scope of application of the article related to that of subsequent articles. He therefore favoured retention of the existing text.

74. **Mr. RAUSCHER** (Austria) endorsed the views of the representatives of Finland and Singapore. Austria felt that it was not necessary to have a general statement on the validity of data messages in addition to the specific provisions in articles 5 to 8. However, it appeared that some legal systems would require such a general statement. He suggested as a compromise solution that article 4 be retained, and that a strongly worded statement be included in the Guide to Enactment to the effect that article 4 enunciated only the basic principle of non-discrimination, and was not intended to overrule the more specific requirements of articles 5 to 9.

75. **Ms. REMSU** (Observer for Canada) agreed that article 4 should be retained, and that the word "solely" was sufficient to establish the general character of the article as compared to the specific requirements of subsequent ones. She supported the suggestion for a commentary to make the point clear.

76. **Ms. EKEMEZIE** (Nigeria) also supported retention of article 4.

77. **Ms. ZHANG Yuejiao** (China) said that, since electronic data messages were a new form of business transaction, they had not yet been given recognition in many legal systems. It was thus important to retain a provision granting such legal recognition.

78. **Mr. BROQVIST** (Observer for Sweden) supported the Austrian proposal.

79. **Mr. ANDERSEN** (Observer for Denmark) also endorsed that proposal. The argument by the United Kingdom representative that information did not in itself have legal effectiveness did not take into account the fact that article 4 was concerned with a specific type of information, namely information in the form of a data message. At any rate, a provision containing such an important principle should not be deleted.

80. **Mr. BURMAN** (United States of America) said that the language of article 4 had given rise to some difficulty, and had been laboured over extensively; the wording that had emerged had been the best that could be found. He endorsed the Austrian proposal for clarification in a commentary.

81. **Mr. VRELLIS** (Observer for Greece) said it was clear that article 4 was very important and should be retained. However, the drafting could be improved, and he supported the United Kingdom proposal in that regard.

82. **The CHAIRMAN** noted that there was overwhelming support for retention of article 4. There seemed also to be support for the Austrian suggestion that a commentary on that article be included in the Guide. He took it that there were no objections to the United Kingdom proposal.

83. **Mr. GRIFFITH** (Australia) said that the United Kingdom proposal seemed unnecessary.

84. **Mr. BURMAN** (United States of America) said that the United Kingdom proposal had certainly not received overwhelming support.

85. **Mr. ALLEN** (United Kingdom) said he had not proposed any specific amendment to article 4, but had proposed that the text should be reviewed by the drafting group. The fact that an earlier drafting group had already worked on the text did not mean that another group would not succeed in finding a better solution.

86. **Ms. de LA PRESLE** (France) supported the United Kingdom proposal. If the article was to have an educational value for jurists not familiar with modern means of communication, it was important to ensure that it was properly worded.

87. **Mr. GRIFFITH** (Australia) said that it was clearly the majority view that the text produced by the Working Group on Electronic Data Interchange was fully satisfactory. The idea that article 4 needed improvement had received only minimal support. As a matter of principle, the Commission should support texts approved by the Working Group, unless a clear majority favoured a specific alternative. He urged the Commission to endorse the existing text of article 4.

88. **The CHAIRMAN** said the debate had shown that article 4 as it stood was acceptable. Since the text would in any case be referred to the drafting group for finalization, further drafting refinements would not be ruled out, but he took it the Commission's position was that the basic concept of the article was satisfactory and that the debate on it should not be reopened.

ELECTION OF OFFICERS *(continued)*

89. **Mr. GRIFFITH** (Australia) nominated Mr. Bossa (Uganda) for the office of Rapporteur.

90. *Mr. Bossa (Uganda) was elected Rapporteur by acclamation.*

The meeting rose at 5 p.m.